STATE OF MICHIGAN

COURT OF APPEALS

TERRY SIMON and MARGARET SIMON,

Plaintiffs-Appellees,

v

CITY OF NORTON SHORES and CITY OF NORTON SHORES ZONING BOARD OF APPEALS,

Defendants-Appellants.

UNPUBLISHED
September 29, 2009

No. 287119
Muskegon Circuit Court
LC No. 07-045548-AA

Before: Murray, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Defendants appeal by delayed leave granted the trial court's order reversing the decision of defendant Zoning Board of Appeals (ZBA) that allowed plaintiffs' neighbors to build a fence allegedly not in conformance with local ordinances. We reverse and remand for further proceedings consistent with this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts and Proceedings

Plaintiffs live west of their adjacent neighbors, the Sipovics, and both have frontage on Mona Lake. The Sipovics wanted to construct a fence and applied for a building permit, submitting their plan to Richard Maher, Community Development Director for the City of Norton Shores, who also serves as the building and zoning administrator (though that is not his title). The relevant ordinances provide:

> § 2.281: [Defines "front yard" as] An open space extending the full width of the lot between the principal building and the front lot line, unoccupied and unobstructed from the ground upward, except as hereinafter specified.
>
> § 2.283: [Defines "side yard" as] An open, unoccupied space, situated between the side line of the principal building and the adjacent side line of the lot and extending from the front yard to the rear yard.
>
> § 4.102(1)(A) [establishing setbacks]: No structure may be built closer to a lake or stream than an adjacent principal structure, and where each adjoining parcel

> has a principal structure then no closer than a straight line drawn from the front of each principal building, but in no case less than 50 feet from the high water mark of the shore . . . .
>
> § 4.103(1): The water side of the yard shall be considered the front yard.
>
> § 15.100(1)(B): Fences shall not exceed four feet (4') in height, except where otherwise permitted in this section . . . .
>
> § 15.100(2): Fences within a side or rear yard shall not exceed six feet (6') in height, measured from the surface of the ground, and shall not extend beyond the required minimum front yard.
>
> § 16.101(3): The Building and Zoning Administrator shall not vary, change, or grant exceptions to any terms of this Ordinance, or to any person making application under the requirements of this Ordinance.

Apparently, there is no definition of "required minimum front yard," though defendants assert that § 4.102(1)(A) provides the definition.

Maher granted the permit, sending Mr. Sipovic a letter dated July 7, 2007. Maher noted the definition of "front yard" in § 2.281, and then stated that "it was not the spirit or intent of the zoning ordinance to prohibit a fence as per your submittal, given the fact that your neighbor to the west could erect such a fence on their property being that it would be behind the minimum required set back and be in their side yard." The letter noted that approval was premised on an amendment to the proposed site plan: 12 feet of solid, six-foot fence instead of the proposed 24 feet of solid, six-foot fence.

When plaintiffs appealed this decision, arguing that the Sipovics put in four sections of solid, higher-than-four-feet fence instead of the two sections the permit allowed, the City made them complete a form for requesting a variance, and made them pay the $150 fee assessed for variance hearings. A public hearing was held where the ZBA took testimony and then postponed its decision to consider the matter. The ZBA made its decision the next week, approving the permit for the reasons given in Maher's letter.

The debate between the parties is whether § 15.100(2), which allows six-foot fences only up to the "required minimum front yard," means fences may extend to the setback line as defined in § 4.102(1)(A) of the ordinances or whether they cannot extend into the front yard at all, as defined in § 2.281.

The circuit court stated its ruling as follows:

> The language of the ordinance is clear and unambiguous, and provides that a six-foot fence shall not extend from a side yard into a front yard. The court is not required to give deference to a municipality's interpretation of an ordinance if the language of the ordinance is clear and unambiguous.

The court therefore concluded that, "the decision to grant the building permit was not a reasonable exercise of discretion, as neither the Building and Zoning Administrator, nor the ZBA, have the discretion to ignore the plain meaning of the ordinances." The court said, "The decision of the ZBA as to the issuance of the building permit is reversed on this ground, and the building permit as previously issued is to be considered null and void." By voiding the entire building permit, the court not only disallowed a six-foot high fence extending into a front yard (wherever that may begin); it also disallowed the four-foot high fence that goes from the end of the six-foot high fence down to the water's edge.

The circuit court also held that the City violated MCL 125.3604(2) by requiring plaintiffs to complete a form entitled "Variance Request" instead of allowing them to file a "notice of appeal," as the statute requires. The court held the City could charge a fee for a ZBA hearing but that the ZBA violated MCL 125.3604(3) by not ordering a stay of construction during the appeal. However, the court noted this did not affect the ZBA's decision and the court declined to reverse on that ground alone. Finally, the court held that Maher could hold a combined position of Building and Zoning Administrator and Community Development Director under a single title. Plaintiffs' other issues (the Sipovics began building before getting the permit; more than 12 feet of the fence is higher than four feet and more than 50 percent opaque; the site plan shows the six-foot fence terminating farther north than it actually does; the site plan itself is inaccurate) were not decided because they were moot under the court's ruling.

II. Analysis

A circuit court reviews the decision of a zoning board of appeals to ensure that it:

> (a) Complies with the constitution and laws of the state.
>
> (b) Is based upon proper procedure.
>
> (c) Is supported by competent, material, and substantial evidence on the record.
>
> (d) Represents the reasonable exercise of discretion granted by law to the zoning board of appeals. [MCL 125.3606(1).]

Legal questions, such as the interpretation of a township zoning ordinance, are reviewed de novo. *Yankee Springs Twp v Fox*, 264 Mich App 604, 605-606; 692 NW2d 728 (2004). The rules of statutory construction apply to ordinances. *Id*. at 608 (citations omitted). Therefore, when the language in an ordinance is clear and unambiguous, it must be enforced as written. *Kalinoff v Columbus Twp*, 214 Mich App 7, 10; 542 NW2d 276 (1995). When the language of the ordinance is ambiguous, the court may not substitute its judgment "by imposing what it considers to be the wisest version of the ordinance, but is confined to an analysis of the text of the ordinance and, in the face of ambiguity, a determination of what the legislative body that enacted the ordinance intended by the language in question." *Macenas v Michiana*, 433 Mich 380, 396-397; 446 NW2d 102 (1989).

Defendants' framing of the issue upon which delayed leave was granted implicates only the question raised by Maher's explanation for granting the building permit, i.e., only the issue of where the front yard begins for the purpose of determining where the six-foot high fence must

stop. The circuit court's ruling (the ordinance clearly says that "a six-foot fence shall not extend from a side yard into a front yard") essentially read the words "required minimum" out of § 15.100(2). That section says, "Fences within a side or rear yard shall not exceed six feet (6') in height, measured from the surface of the ground, and shall not extend beyond the *required minimum* front yard" (emphasis added). A reviewing court's interpretation is flawed where "it fails to give meaning to all the words of the [ordinance]" because "courts must give effect to every word, phrase, and clause in [an ordinance] and avoid an interpretation that would render any part of the [ordinance] surplusage or nugatory." *Jenkins v Patel*, 471 Mich 158, 167; 684 NW2d 346 (2004) (quotation marks and citation omitted). Contrary to the circuit court's ruling, § 15.100(2) does not unambiguously completely prohibit a six-foot fence from extending into any part of the actual front yard. Where the fence may extend depends on how "required minimum front yard" is defined.

There is no definition of "required minimum front yard" in the ordinances. Maher considered other parts of the ordinance, and particularly § 4.102(1)(A), which provides that the closest a principal structure can be to the water is the point where it meets "a straight line drawn from the front of each principal building" on adjoining parcels. Defendants mark that as the beginning of the "required minimum front yard." That appears to be a reasonable interpretation of the statutory language. The circuit court erred in finding the language unambiguous and in construing the ordinance in a way that reads the words "required minimum" out of the language.

Because it decided the entire project was not valid, the circuit court did not address how much of the six-foot fence, if any, extended beyond the setback line, nor did it address plaintiffs' contention that some of the new fence exceeded six feet tall. A remand is necessary to allow the court to address these issues.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

No costs, a public question involved.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Stephen L. Borrello